No. 22207

UNITED STATES COURT OF APPEALS

for the NINTH CIRCUIT

- - - - - - - - -

Reuben G. Lenske,

Appellant

v.

Magner Dale Knutsen and Judith Knutsen,

Appellees

- - - - - - - - - - - - -

APPELLANT'S REPLY BRIEF

- - - - - - - - - - - -

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

- - - - - - - - - - - - - -

Reuben G. Lenske
1014 SW 2nd Avenue
Portland, Oregon 97204
Attorney pro se

SUBJECT INDEX

Authorities

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APPELLANT'S REPLY BRIEF

He lost his top hat

When Franklin Roosevelt was inaugurated in March, 1934, banks were closing left and right all over the United States. Roosevelt found it necessary to declare an extended bank holiday to prevent wholesale bank liquidations. Roosevelt then called for remedial legislation to protect the banks and secure the depositors. Fortified with such legislation and wise federal administrative steps, the banks reopened and have prospered ever since. But what was the banks' reaction to Roosevelt's saving them? Appreciation? Never. They villified Franklin Roosevelt for not having given them an extra bonanza of billions of dollars profit when the gold content of the dollar was reduced. In response, Roosevelt likened the banks to a man wearing a tophat. As he strolled along the river bank he fell into the river and was about to drown when an interested passerby jumped into the river and brought the drowning man safely to shore. Upon gaining his composure, the rescued man, glancing at the river, observed his tophat floating down the river beyond reach and he turned critically toward his rescuer with the severe admonition that he should have saved his tophat.

No unbiased person can read the record in this case and examine the exhibits without coming to one uncontradictable conclusion, that I saved the farm, home and timber property for Knutsen with the sole limitation that I expected to be paid fair compensation for my services and advances. No one can fairly read into the record anything else. But Knutsen was not content with my having saved his farm for him, he wanted the tophat also; he wanted it free of the burden of paying for the rescue. Stripped of the legal folderoll that is all this case is about. Had I the courage and had I not had two disdisheartening experiences with judges (this case is one and my tax case,

19539, CCA 9, is the other) I would rest my reply without further ado. But I shall answer to a modest extent the legal folderoll with my own. I shall cover later the statements in pages 1 to 5 of appellees' answering brief that need correction and shall commence with their arguments.

Prejudice

My Assignment of Error I, page 6; Appellees' brief pages 6-10.

Appellees make three points. The first is that I had secured the dis-qualification of Judge Kilkenny and therefore used up the limit of one. 2 144 appears on page 6 of my opening brief. It says in part,

"A party may file only one such affidavit in any case."

The intention to file an affidavit is not the equivalent of filing one. Who would want to be penalized for each intent that is not carried out or deserve to be rewarded for each good intent not carried out? One mu indeed grab for straws to extend the plain wording of the law as sought b counsel for appellees.

Appellees' point 2 is that the affidavit wasn't filed timely. Judge Kil after disqualifying himself, on April 21, 1967 set the matter for pretrial Judge Belloni for April 24, 1967. Immediately after that, on April 21, 1 I left for California and did not return till April 28, 1967 and did not co my office till that afternoon, which was Friday. I had a case pending in Supreme Court of Oregon which was to be argued on May 5, 1967. In the case I had to appear before the trial court on May 2, 1967. I had to com a brief for the Circuit Court of Appeals and did on May 12, 1967. That w also on a Friday. May 15, 1967, Monday, was the first opportunity avai for me to file the affidavit of prejudice and then I did. I had not previou appeared before Judge Belloni in this case and when I did appear before on May 16, 1967 I argued my motion. See R 63, Tr Vol. I, page 30. I ceeded with the affidavit as soon as I physically could under my circums

Finally, as their point 3, appellees attack the sufficiency of my affidavit. I set forth, R 64, the series of unjust influencing forces that pervaded the judges of my State over a period of almost five years leading directly to the fact "that I believe that the Hon. Robert C. Belloni...is prejudiced against me and that I cannot have a fair and impartial trial before him." Judge Belloni denied me the opportunity to adduce evidence in support of my motion to disqualify him, Tr Vol I, 3. Appellees do not deny in their brief the facts I set forth in the last paragraph of page 6 of my opening brief which demonstrated more than an affidavit could that Judge Belloni's consideration for the physical well being of Knutsen and his attorney were not present when I needed human consideration. Judge Belloni criticized me for my slowness at the end of a full day's trial, or what should have been the end of the day at 5 o'clock, when I had not during the entire day had anything to eat; yet he required me to proceed with the trial after 5 o'clock despite my request for adjournment till the following day.

The statute, 28 USC 144, wisely refers to the "belief that bias or prejudice exists." When a litigant or his attorney (in my case it was both) believes that he cannot have a fair trial before a judge he then and there cannot have a fair trial. He is automatically handicapped in his presentation, his preparation, his testimony. For that reason in many states, including Oregon, the mere statement in the affidavit of the belief that the litigant cannot have a fair trial before a specific judge is a sufficient allegation of fact to disqualify a judge. Oregon Revised Statutes 14.260 merely requires the affidavit to state that "such party or attorney cannot or believes that he cannot have a fair and impartial trial ...before such judge." See also:

State v. Weiss, Vol. 84 Advance Sheets Aug. 2, 1967, No. 18, page 1057

Bi-lateral pre trial conference and time of trial.

My assignment of error 2, op br 7, appellees' brief 10.

After disqualifying himself Judge Kilkenny, on Friday April 21, 1967, set the pretrial conference for 9 a.m. April 24th before Judge Belloni. I was in California at that time and, the day before, sent a memorandum to the clerk for presentation to the court if it held a pre trial conference See Tr Vol I, 34. I do not believe that after a judge disqualifies himself as Judge Kilkenny did, he has the right to assign a case to a specific judge and set a hearing before that judge for a specific time. I believe the setting for April 24th was invalid. I took my chance on that score but I did prepare and mail a memorandum to the court. Whether it be for good reason or necessity I did not return on Monday, April 24 and if an assignment for such hearing, not by the judge who was to conduct the hearing, but by the judge who had already disqualified himself in the case, is valid, then I am bound by the pre trial conference of that date if it were held. But it was not held that day. Appellees contend that I should have been punished for not appearing on April 24. The punishm should in no event go beyond holding the hearing on that date. It should extend to the holding of a hearing on another date of which I had no infor The latter is what happened.

The court set the pretrial hearing for Friday morning, April 28. E the court and the clerk knew that I was in California on April 24 and that expected to remain that week, except that I was to return Friday, April to participate in hearing the oral exams of a student at Reed College wh was seeking his degree. Se Tr Vol I, 21-36. Yet the pretrial conferen was set for the morning of April 28 and the only notice was a card sent my office on April 24 or 25. I had no employees and my office was clos during the time I was gone that week and I didn't receive the card till th afternoon of April 28 when the hearing was over.

A punishment should fit the crime. I should not be punished for the April 24 non appearance by non notification of the April 28 hearing. It was known that I was away for the week except for the required return for the Reed College examination on April 28. The proper procedure would have been to attempt to phone my office to ascertain what time Friday I would be back and what time the Reed College examination was. It would then have been ascertained that my office was closed since I had no employees. SeeTr Vol I, 23. Sending a card on April 24 or 25 did not result in notice to me before the hearing was held.

The court said, Tr Vol I, 18, "And if Mr. Lenske did not know a conference was to be held, certainly one should be held." But the court did not follow its own principle. Was it prejudice or merely unjust punishment And so the court denied me a pre trial conference and denied my affidavit of prejudice and required me to go to trial that morning of May 16, 1967 before I had opportunity to read the reporter's transcript of the April 28 conference between appellees' counsel and the court. The result was a denial of due process.

Refusal to admit Exhibit 120

My assignment 2 1/2, page 8; appellees' brief page 16.

Knutsen testified, Tr I, 110 , 100, that the Crawford sale was for $12,500 and the proferred exhibit showed it was $11,500. That contract was valid evidence for impeachment purposes and also to show services for Knutsen on my part and also for intent on Knutsen's part and on my part. This was a contract I had drawn for Knutsen. Certainly if the court were willing to hear my defense that I had attorney fees coming for my services in connection with this property it would have admitted that contract.

MY RIGHT TO A JURY TRIAL

My assignment of error 3, op br 9; Appellees' br 3-4.

Even though this issue cover but a page in my brief and a little over page in appellees' brief I believe this is the most important legal and constitutional point in the case.

The tort issue against me was peculiarly a jury issue and one which would not have knowingly waived.

FRCP 38

(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(b) Demand. Any party may demand a trial by jury of any issue tri of right by a jury by serving upon the other parties a demand therefor i at any time after the commencement of the action and not later than 10 d after the service of the last pleading directed to such issue. Such dema be indorsed upon a pleading of the party.

(d) Waiver. The failure of a party to serve a demand as required b rule and to file it as required by Rule 5 (d) constitutes a waiver by him trial by jury...

FRCP 39

Rule 39. Trial by Jury or by the Court

(b) ... but, notwithstanding the failure of a party to demand a jury an action in which such a demand might have been made of right, the co its discretion upon motion may order a trial by a jury of any or all issu

Tr Vol I, 6

MR. LENSKE: I would like the record to show that the Knutsens, th their counsel and their pleadings, indicated a demand for a jury trial. I a close perusa. of their pretrial order that they prepared would indicate And until my return from California, the Clerk had indicated that this w going to be a jury trial, that he was going to have a jury. And only duri I think it was the past week had I received an indication from the Clerk he was not going to treat it as a jury trial, because neither side had file demand for a jury. And then as soon as I could, I filed my demand for a However, I believe that since there has been an issue between the parti to whether this is a law proceeding or an equity proceeding, that I felt t

a ruling by the Court that it is a jury case.

As long ago as December 30, 1966 service was made upon me by appellees' counsel (See certificate of service by mail, R 114) of their proposed supplemental pre-trial order. This contained proposed paragraph V which stated:

"V

The following are issues of fact to be decided by the jury."

Then follow issues of fact including the issue of which the court found judgment against me. (R 113)

This in itself could well be construed as a request for a jury by appellees or, at the least, the basis for estoppel to claim that I was not entitled to a jury trial because of lack of earlier demand by me.

Promptly after I learned that question was raised about a jury trial I filed my motion of May 12, 1967 (R 60 in which I asked for a pre-trial conference , a setting over of the trial itself and, in my supporting affidavit I said; "that in any event I demand a jury trial."

For the many months that the case was pending plaintiffs' attorneys proceeded on the basis that they would have a jury trial on most of the issues of fact (R 113), I presumed that there would be a jury trial if there would be a law case issue (Tr Vol I, 6), and the court itself and the Clerk proceeded on the basis that it would be at least in part a jury case (Tr Vol I, 8). But the following did occur: (Tr Vol I, 8, line 22)

THE COURT: The Court will have to acknowledge that it was assumed by the Court originally that this would be a jury trial. Only when I examined the file and noticed that no demand had been made under Rule 38 did I personally inform the clerk not to call a jury for today. But Rule 38 is the rule. I see no particular reason to waive it.

Under the facts of this case it was a clear abuse of discretion, given the court under Rule 39 (b), for the court to reverse the thinking of everyone involved in the case, including itself, and apply rules 38 and 39 strictly against

But there is another reason why I was entitled to a jury trial as a matter of right. The rule (38) requires a demand for a jury within 10 days after the last pleading is filed. Under the practice in the District Court of Oregon the pleadings are of little consequence, the issues being formed in the pre trial order and the pleadings thereupon being entirely eliminated. I have already pointed out (R 113) that the proposed pre trial order of appellees included a jury trial on the major issues.

I did not know until the day of trial whether the case was a law case, an equity case, or part law and part equity. The court did not make its pre trial order until May 16th, the morning of the trial. It held the ex pa pre trial proceeding on April 28, 1967 but no order was entered til May I ordered a transcript of what occurred on April 28, 1967 immediately a I found out that a pre trial conference had been held, if what occurred co properly within that phrase. But the reporter did not complete the tran till May 15th or deliver it to me till trial time, May 16th. (Tr Vol I, 10,

The application of Rules 38 and 39 to our type of proceeding, to be f should be construed to mean that the demand must be made within 10 day after the pre trial order is made up. In the instant case it was not know until trial time, May 16th, that there was a jury issue. It should not be cumbent upon a litigant in a case that commenced as an equity case to m what might be a useless act, file a demand for a jury - just in case. Th rule of reason should prevail - that a demand for jury need not be made till the court determines that there is an issue which normally may be tried as a fact issue in a law case.

THE STATUTE OF LIMITATIONS

My assignment of error 4, op br 10; Appellees' br 18 - 23.

The first point of appellees is of no consequence. Since neither the Heddons or I ever contended that the property in issue was anyone else's but Knutsen's there never was an issue on that score. The sole issue was whether Knutsen owed me any money for services or advances and, if so, whether the property stood good for either or both. The two year statute quoted by appellees in their appendix, ORS 12.110(1) as modified by ORS 12.040(4) is applicable. The two years would commence running from the date of the discovery.

I find it more difficult to urge and reurge the statute of limitations assignment than other assignment of errors even though on the combination law and fact there should be no doubt about the correctness of this assignment of error. The reason for the difficulty is that it could be inferring the thing that's wrong about Knutsen's case against me is that the law lapsed on him. Since I did nothing but good for Knutsen and since the only fraud is his attempt to beat me out of advances and fees, why should I resort to this clear and unqualified defense of the statute of limitations. I suppose that the reason is that judges occasionally lapse into injustice (Two have already done that to me, one in this case) but the unjust results are sometimes righted by the law, even procedural law.

Sometimes an untruth returns to plague the untruthsayer. Knutsen's counsel asked him (Tr Vol I, 57):

Q Have you or have you not at any time requested of Mr. Lenske that he secure for you a deed back to this property which is the subject of this suit?

A Well, yes. Just before we moved back on to the property I asked him about it.

The question was, did he request and the answer was yes. This was supposed to have occurred in April, 1963, a year after the conveyance by Knutsen to Heddon. The answer that Knutsen said I gave was that I said

(Tr Vol I 57 line 21) "Well, he would look into it and let me know." If I defrauded him and he was entitled to reconveyance at that time this was the time to take notice. But if not then, how soon after that? How long should it have taken to at least be suspicious when nothing happened about the "and let me know." Would a month be enough, three months, six months, twelve months? In any of those categories the statute of limitations will have run.

Appellees' counsel inferred that the April 1963 presumed instance was a request and that the January 1965 one was a demand. But in both instances the leading question by counsel was, did he request and in both instances the answers were yes. See Tr Vol I, page 57, line 24, when he was asked, "Did you at any other time request...?" Knutsen used th same kind of language to the second request, i.e., page 58, line 6, whe again he said, "I asked..." He had also used the words"I asked..." on on line 19 of page 57 relating to the presumed conversation of April, 196

I do not believe that a just court can make the fine distinctions that counsel for appellees have tried so hard to make that would "lull" Knuts into somnolence from May, 1962 when he received the letter from the Government agency until April or May of 1963 and then when he made the inquiry (he says) in April 1963 that he "lull" again for another year or m

The fact is that not all the Richard Riches are lawyers (See "A man all seasons" in the movies if you have not). Some of the Richard Riches young men who know enough to pay a cash finder's fee to an employee to clear the way for a sale to the employer, the fee being a mere $500. It not difficult for such an innocent Richard Rich to bite that hand that fed h in the guise of innocent betrayal. This is the same young man who did nc his childrens' support money, he did not pay the Government mortgage c the taxes on the property, he did not pay Nine Koch from whom he had borrowed money, he did not pay his lawyer. He did get the use or profi

or income from the property during all the years involved. Yet he uses me as the excuse for not making payments on the mortgage of $100 a month when I succeeded in getting the installment arrangement for him. The court will notice that during all the years Knutsen had the property the balance he owed was almost as much in any year as it was after he made his downpayment. But the instant issue is not the morality of this case but the statute of limitations. I know I'm a hundred per cent right on the running of the statute of limitations - it has run because more than two years has elapsed since the basis for the cause should have been discovered by Knutsen if his own testimony is to be believed. But I am not satisfied with that as the sole reason for my vidication. The truth is that the only fraud was that played upon me by Knutsen and his present counsel and which was sanctified into judgment by the trial court.

The court denied me the right to state my contentions

My assignment 5, op br 12, appellees' brief 23.

This assignment is so fundamental that I become amazed whenever I think of it. It is one thing for a court to hold that a litigant's contention is invalid in law or in fact. But it is another thing for the court to make a pre trial order that eliminates a litigant's pleadings and says to the litigant, "You may not set forth before this court what your contentions are." It amazes me that a Federal judge will do that, that a group of lawyers will argue the correctness of such action. Now to the merits of some of my contentions.

My first point was that all issues between Knutsen and myself could and should have been determined in one case in the State Court, including the right of redemption and the right to any surplus upon sale. My second point was that in no event should an issue of damages between two defendants be tried out in a Federal Court between citizens of the same State.

My contentions 4 and 5 are that if the court does accept jurisdiction of a tort claim against me by Knutsen it should likewise consider my tort claim against him for defrauding me.

Then I contended that Knutsen did not come into court with clean han and that he is seeking equity but not offering to do equity.

I also contended that the court had no jurisdiction to consider the cla for punitive damages.

I shall now consider some of the authorities and arguments of appell on the foregoing. On page 28 of their brief appellees state under point 2 that Knutsen's cross-claim for damages against me arose out of the tra action or occurrence that is the subject of the original action. Then the say, "This may seem startling at first, because of a natural tendency to assume that Knutsen's having given a note and mortgage to F.H.A. w the transaction which was the subject of the original complaint." Appellees are right. The subject of the suit is the note and mortgage signed by Knutsen to the Government and the jurisdiction stems from th complaint which alleges just that and that is the transaction from which everything else must stem. There is no allegation that I represented Knutsen in that transaction. The citations about the meaning of "trans-action" being flexible and liberally construed just don't go that far afield the simple language of Rule 13(g). There is nothing in the complaint abo the reasons for nonpayment. There is nothing in the complaint about Kn trying to cheat his attorney who helped save the property for him during three lean years and there is nothing in the complaint about Knutsen's attorney trying to cheat Knutsen out of his property. Nor is there anything in the complaint about any quarreling between Knutsen and his ex-wife or with his present wife, any one of the foregoing items being the possible motive or side reason for the payments of principal, interest a

taxes having been neglected or intentionally avoided. Would counsel for appellees claim that the issue of divorce, amount of support money, etc. could be cross-claimed between the parties when the "occurrence" that prompted the failure to make the mortgage payments stemmed from one of those motives?

On page 30 of their brief appellees justify their cross-claim for damages because the damage claim is "related to" the property. I suppose that the same argument could be made that when the special right of the Government to foreclose its mortgage in Federal Court is taken against the mortgagor and the tenant in possession, both local citizens, the tenant could cross-claim against the mortgagor for personal injuries or the landlord-mortgagor could cross-claim against the tenant for slander when he sought to collect rent.

Appellees attempt to liken their claim to the foreclosure of a second mortgage in the same suit. Knutsen was never a second mortgagee; he was always the owner; either Heddon or I was the second mortgagee. If the court could consider ancillary claims it would be whether at the posture of the case at trial time Knutsen owed me any money for services or advances relating to the property and whether by subrogation or agreement or attorney's lien the property stood good for such claim. As to that the court found against me as to the lien but it specifically stated and found (Tr II, 285):

> "I am in no position to state and certainly in no position to arrive at any figure should he owe him money for this purpose. That is not a question to be determined by this court, at least in this proceeding."

Then on page 31 of their brief appellees quote from authorities that 13(g) was intended "to avoid circuity of action" and "to prevent multiplicity of litigation and to bring about prompt resolution of all disputes arising from common matters" and "Our courts should be vitally concerned to see to it that disputes between parties be resolved in as few lawsuits as possible

These are all good statements of good law. The fallacy of appellees' contentions are that the court stretched the principle in their favor and refused to apply the principle for me. It assumed a tort case against me but it refused to consider a tort case by me against Knutsen. It refused to decide or rather to allow as a contention on my part, the issue of fees and advances, although it signed a decree that there was no convincing proof of services by me. In short, the court specifically adopted the program of piecemeal litigation. It took the claim of one side for litigat and denied consideration of the claim of the other side. I believe that my contention was right that only a State Court could try all issues betw the parties defendant in one case; the issue of right of redemption, the issue of damages from me to Knutsen, damages from Knutsen to me, the issue of services by me or advances by me. The court, in its preju eyed but one direction - how to get at me, not where complete justice be the parties lay on all issues raised between them.

On page 32 of their brief appellees claim that exemplary damage jurisdiction does lie in a Federal equity case even though it might not in a state case. In arriving at that conclusion appellees stress the brea of the scope pronounced by the rules when they say on page 35, "Rule 2 provides 'there shall be one form of action to be known as civil action:'" Rule 8(a) establishes that "relief*** of several different types may be demanded;" Rule 8(e)(2) authorizes a party to "state as many separate claims ***as he has***whether based on legal(or) equitable grounds***;" and Rule 18(a) makes clear that "a party asserting a claim to relief as a original claim, counterclaim, cross-claim, or third-party claim, may join *** as many claims, legal (or) equitable***as he has against an opp party."

The trouble with appellees' reasoning is that they stop when the prin

applies in reverse. What happens to these broad statements when you consider my claim for attorney fees and advances, my claim of a fraudulent sale by Knutsen to me? Appellees and the trial court refuse to acknowledge that what is sauce for the goose is sauce for the gander. But appellees are mistaken when they reason that the issue of punitive damages is merely a procedural matter.

When a court grants a judgment of $250 compensatory damages and $5000 punitive damages the $5000 is pretty substantive. Punitive damages are not favored in the law because of their inherent vindictive character. They constitute payment of a fine - not to the public trough - but to the private pocket of one whom the court says it has already fully compensated. That is why courts will, in the State of Oregon, deny punitive damages in all equity cases but will also frequently deny them in jury cases. Thus the court said in:

Becker v. Pearson, 241 Or 215, 220 (1965)
405 P 2d 534

page 220: '***punitive damages are not favored in the law.'

Smith v. Abel, 211 Or 571, 595
316 P 2d 793

page 595: "***the jury awarded the sum of $2000 as punitive damages***

It is axiomatic that punitive damages are not favored in the law. Reversed."

Perry v. Thomas et al, 197 Or 374, 391 (1953)
253 P 2d 290

page 391: "Punitive damages are not recoverable merely because a conversion took place.

page 395: "The judgment ***will be corrected by eliminating punitive damages ($5000)."

O'Harra v. Pundt, 210 Or 533, 550 (1957)
310 P 2d 1110

This was an action in trover for killing impounded dogs (referred to in the case as "man's best friend."

issue of punitive damages to the jury."

page 551: "The judgment for $1000 compensatory damages is affirmed The judgment for punitive damages ($5000) is reversed."

Dietzman v. Ralston Purina Co.
84 Oregon Adv. Sheets 497, March 22, 1967
425 P 2d 163.

page 497: "Plaintiffs executed and delivered to defendant a chattel mortgage covering a flock of chickens owned by them. Plain contend that the chattel mortgage was invalid; that defendant refused to release the mortgage; that as a result plaintiffs w unable to obtain feed on credit and were forced to sell their

It is plaintiffs' theory that defendant's conduct which resulte forcing plaintiffs to sell their chickens constituted a convers

The mere assertion of an unfounded lien does not constitute conversion. Richstein v. Roesch, 71 S.D. 451, 25 NW 2d 55 169 ALR 98 (1946) is closely in point. See also, Restatemer (Second), Torts Sec. 224 (1965)."

In the above case the plaintiffs sought $3635 compensatory damages

further alleged in their amended complaint: (Ab of Rec 20)

"That the acts of defendant***in asserting rights under a ch mortgage and in refusing to release said chattel mortgage of record were oppressive, fraudulent, in wanton and reckless regard of the rights of plaintiffs, defendant having no claim soever to said chickens, and by reason thereof plaintiffs dem exemplary and punitive damages from defendant in the sum o $25,000.00."

My claims against Knutsen

Under their point 4 on page 41 of their brief appellees refer to my brief, page 13, and the claims I have against Knutsen which the court would not permit the dignity of a contention.

All of the citations of apellees, all of their arguments to sustain the court's jurisdiction in the claims of Knutsen against me have equal force in admonishing the court to consider my claims.

He who seeks equity must do equity.

Also

Clean Hands Doctrine.

I included amongst my contentions the clean hands doctrine and the maxim that he who seeks equity must do equity. The court denied me the right to make those claims. Here again we come to the fundamental question of whether a court can throw out a pleading and then decide in a pre trial order what a litigant's contentions are. This is such a fundamental denial of due process that it is difficult for me to believe that a Federal District Court judge would do such a thing. Appellees condone the court's action in pages 43 to 46 of their brief. They say on page 45 that requiring Knutsen to pay attorney fees under the guise of doing equity "would be the same thing as permitting the defendant Lenske to obtain a cross-claim for those fees." My cross-claim should have been permitted based on the contention of appellees that circuity and multiplicity of actions should be avoided. But regardless of that error it was also error for the court to refuse to apply the equitable maxims. Also, it must remembered that the court denied me the right to make the contentions. To say afterwards, well, the record shows you weren't right anyhow is like inducing an abortion and saying the embryo had not matured. It is with that analogy that appellees wind up the point with the finding of fact No. 6 as quoted on page 47 of their brief,

"There was no convincing proof of the amount or value, if any, of legal

defendants Knutsen***! (R 79). Only a clearly closed ear could not hea
the
and only closed eyes could not see/obvious through the exhibits introduce

and the testimony of Jo Anne Click, former wife of Knutsen. See Tr Vol

124:

BY MR. LENSKE:

Q Do you have in your favor a judgment or decree requiring support money payments for your children?
A Yes.

Q What was the original amount of that requirement of the decree?
A I believe it was $150 a month.

Q Do you remember ever receiving any money from me to pay up the amounts owing at any particular time?
A Yes, I do.
A It was October of 1962, and it paid the child support up to September 1st, and it was in the amount of $2025...

Q ...And I gave you my check for $2,025 at that time?
A You gave me your check, and on the bottom, it said something about the Knutsen account.

The total cash outlay by me for Knutsen was over $4000 but that simp

didn't interest the court. Following are some authorities in Oregon reg

fees.

Hay v. Erwin, 244 Or 488 (1966)
419 P 2d 32

Erwin, an attorney, entered into a contingent fee agreement with his

client on a contingent basis in a divorce case. He claimed a lien. The c

held the contingent fee agreement void but found that $30,000 was a reasc

fee and awarded Erwin $30,000 on quantum meruit.

Jackson v. Stearns, 48 Or 25, 29, (1906)
84 Pac. 798

Page 29:

"But since the time of Lord Mansfield, it has been the practi of courts to intervene to protect attorneys against settlement cheat them out of their costs.

Hamilton v. Holms, 48 Or 453, 461 (1906)
87 Pac. 154

Page 461:

"***if Mrs. Hamilton had stipulated to give the defendants or half of the entire real property which they could secure for h the compensation would not have been unreasonable, in view

the measure agreed upon."

Knutsen admitted he owed me fees. See Tr Vol I, 56-57.

Q (By Mr. Pearlman) At any time have you performed services for Mr. Lenske?
A Yes.

Q (page 57) Did you ever submit a statement or bill to Mr. Lenske for your services?
A No, sir.

Q Why not?
A Well, I figured that it would just kind of help pay what I owed him for attorney fees.

An additional authority is:

Bingham v. Salene, 15 Or 208, 217, 218 (1887)
14 Pac. 521

I might here call the court's attention to Knutsen's testimony on page 51, Vol I, Tr:

Q Have you or have you not ever requested from Mr. Lenske a bill for services rendered?

A Yes, sir.

In my motion for a new trial (R 83) I sought to introduce and used as one of the bases a portion of the deposition of Knutsen that contained the following: (R 86)

Q Did you ever offer to pay me any fees?
A ***I have never been billed.

Q Did you ever discuss with me the matter of paying fees?
A No, I don't believe so.

Q Did you ever ask me what I would charge?
A No, I don't think so.

Q (page 87, line 12) And that at no time was there any discussion between either of us as to what you would pay for fees?
A No.

Q I at no time told you and you at no time asked me what the fees would be?
A No.

Q By "No", you mean that it's correct that nothing was ever said between us relating to fees?
A That is correct.

Q And also you have never paid anything in fees?

A No, I haven't.

Q And you have never offered to pay anything as fees?
A No, I haven't.

This testimony in the deposition of Knutsen was overlooked by me and I believe it was important in judgment of Knutsen's credibility and in judging the factual situation relating to our dealings and that the court should have allowed a new trial and, at the least, reopen and permit this testimony to be a part of the record.

The motion for new trial should have been and should be allowed

Knutsen is entitled to neither compensatory or punitive damages

My assignment 6, 14, ope br; appellants' brief 48.

Before I discuss damages I shall answer the footnote on page 51 of appellees' brief in which they state:

"The Knutsens could not continue to occupy their home in any status other than as tenants because they could not refinance and thereby redeer the property from the government. They attempted to refinance, but 'cou get a loan anyplace, because the title wasn't in my name." (Tr.-I, p.60)

I had, both in open court, and in the writings I submitted to the court see R 51, bound myself as follows:

> "Reuben Lenske offers to do equity as follows: to subordinate any cla he may have in the property for either services or advances, to any first mortgage which the Knutsens need to execute on the property to enable them to pay off the plaintiff or to redeem the property if an execution sale is held* * *"

Mr. Pearlman said at the April 28, 1967 proceeding before Judge Bel (Transcript of Proceedings April 28, 1967) (page 21)

> "I'm not at all sure as to what Mr. Lenske is driving at in his No. 4.

The court says: (page 21)

> "I am not sure what he means either, unless he offers to give you the relief that you told me you wanted awhile ago."

The language is simple and direct. I offered to subordinate any right I might have to any encumbrance Knutsen needs to place on the property to pay off the mortgage to the Government or to redeem from a sale.

This meant that it was simply not true that I was standing in the way of Knutsen refinancing. Moreover, there is not the slightest hint that such request was ever made of me at any time before, during or after the Government's foreclosure suit was filed. My good faith is clear and was all the time. Knutsen's was not after I had saved the property for him and he learned that I was right about it having value and it appeared that he might have to recompense me in some fair manner.

Now let us look at the last portion of paragraph 4, R 51, in which I said:

> "and if Magner Knutsen does not choose to pay the plaintiff or to redeem even the jurisdictional question of the interest of defendants or any of them in the property would be moot."

This should not be too difficult to understand if one wishes to understand it. If Knutsen really wished to pay up the mortgage I was not going to be in his way. He could pay up or redeem, whichever was necessary. Any claim I had was to be subordinated to a mortgagee who would finance. There would then be no occasion for any lawsuit by or with the Government. But what if Knutsen didn't want to pay the Government off or redeem the property? Then the existence of the Government suit was merely a ruse for the purpose of getting me into Federal Court on a tort claim by Knutsen against me. As appellees hoped, my tort claim for bribing my employee to make a sale to me was thrown out by the Federal Court but it would not have been in the State Court. The ruse worked.

Now back to the damages claimed to have been proved, i.e., judgment for costs by the Government against Knutsen for $182.88. If the sole cause for the suit was my claim of an interest in the property all knutsen had to do was ask me to subordinate and acknowledge, as I always did, that any claim on my part was a security claim only. No one doubted that the Government's right was superior. Certainly, if the Crawford deal were concluded as

originally contemplated (See exhibit 120 if the court decides it should hav been accepted in evidence), Ex 121, 163-172, 182, etc., then there would have been a direct conveyance from Heddons to Crawford or back from Heddons to Knutsen and from Knutsen to Crawford. Since the Federal Land Bank was to make a loan to Crawford (Ex 182) it was the Governme business to see that title was in proper shape for the closing of such a lo and the inquiry by Mr. Madson in that letter, "Who is Harold Heddon an on what conditions did you give him a title to the property?" was proper. By the same token it was proper to inquire in the letter about the judgme for $150 a month support money and the previous contract with Puckett.

But the only legal reason the Government had or could have had to foreclose its mortgage was the default of Knutsen and that started in the year 1960 and was present thereafter at all times. The Government had the right to incur those costs against Knutsen at any time after the initial delinquency in 1960. That it may have chosen a particular time for a particular purpose to sue Knutsen and incur those costs does not excuse his liability from the moment of delinquency. We must remember that:

1. The note and mortgage were knutsen's obligation, not mine and it was on this obligation of his that the costs were incurred.

2. He was delinquent on the note and mortgage before I had any attor client relationship with him.

3. If there were any validity to all the other arguments on his part it was still his own duty to mitigate the damages. He should have made h payments and there would have been no court costs. If he had a case aga me he could have sued me and made his legitimate recovery if he was rig

4. The excuse that he would be making the payments and I would be the property is in the face of the fact that he was receiving the use of the property. He was living on it; he was getting the benefit of the crops on

5. THE ONLY REASON THE GOVERNMENT HAD NOT FORECLOSED BEFORE IT DID WAS BECAUSE I MADE PAYMENTS FOR HIM AND BECAUSE I INTERVENED FOR HIM AND BECAUSE I HAD HIM SEEK AND OBTAI THE ASSISTANCE OF SENATOR WAYNE MORSE TO INTERVENE FOR HIM.

6. During the years involved, 1962 to 1966, Knutsen was delinquent in paying the following:

a. Support money for his children. He was obligated under the decree to pay $150.00 per month. After I paid $2025.00 to clear him to September 1, 1962 he made no further payments until after December 10, 1962 when his ex wife filed a statement of delinquency and asked that execution issue. See exhibit 177. He made no payments on support money in 1963. See ledger of exhibit 177. He made no payments until he was cited in court and ordered to $100.00 per month. Thereafter he paid $100.00 per month but was that the reason he found it impractical later to pay $100 per month to the Government on his mortgage?

b. He didn't pay Mrs. Cook from whom he borrowed a substantial sum of money.

c. He didn't pay me.

d. He didn't pay the Government.

I have nothing but sympathy for someone who cannot manage to pay his obligations. I helped him during several of his difficult years. But failure to obligations was chronic with him. To attribute his mortgage foreclosure costs to me is remote beyond reason.

Since there were no damages proved as general or compensatory damages no exemplary damages can follow.

In the footnote on page 54 appellees point out that a mortgage takes precedence over subsequent accruals of support money payments. This is true but the mortgagee would have to foreclose to clear title or pay up the

accruals to clear title. The correspondence I had with the District Attorney of Columbia County, who represented Knutsen's ex wife, discloses that (Ex 183-184) although she had agreed to reduce the paymen to $75.00 she was unwilling to have the decree modified accordingly. Th she could have enforced the full $150 payments on property of record in Knutsen's name. It was perfectly valid and a wise precaution to take for a client and one for which I should be rewarded rather than be designated as a fraud. The fraud in such instance exists only in the mind of the fraud sayer.

Commencing on page 53 appellees again discuss fraud. They cite authorities on the responsibility of an attorney. An attorney, of course, should not defraud his client and a client should not defraud his attorney; nor should a third attorney seek to aid a client in defrauding his attorney There was a time when men who could read and write could and sometim did take advantage of those who couldn't. Those days are over. Means communication today and the degree of education and literacy today have equalized to a major extent knowledge of the ways of doing business. A lawyer today can be the victim of a dumb appearing client more often tha the client be the victim of the lawyer. The standard to be applied today should be an equal standard. Every person should deal honestly with ea other person, no matter the profession.

For me to cheat Knutsen out of his equity, which but for me he would have given up to Crawford at the urgence of the Government Loan agent $1000, in the manner attributed to me by the evil thinking persons who a against me in this case would prove me, not a knave at all, but a fool. committed myself to the U. S. Attorney, to the Government Loan Agent, that the transfer was a security transaction and the testimony of Heddon unqualifiedly proves that. How could any person not an imbecile or utte insane expect to defraud another person through the supposed means tha

was here attributed to me. Knutsen needs no guardian, he has done pretty well for himself in having the use of property and benefiting from its being saved for him till it reached a substantially high value. I would be the one who needs a guardian to look after me if I even dreamed that I could engage in such obviously impossible means of getting someone's property and succeed.

Wrong Findings of Fact

My opening brief, 15, Assignment of Error 7; Appellees' brief 57.

Apellees merely assert in their brief that the findings are supported by the evidence. I stand by what I say in my opening brief. I'll add but a few comments. Apellees say on page 59, "True, Lenske disbursed funds for the account of Knutsen, but they undoubtedly were the monies which Lenske, himself, owed on the Willark property he had purchased under contract from Knutsen." Knutsen testified that the balance on the contract was $3700 to $3800. I testified that it was $3881. It was payable $50 per month including 6% interest. Knutsen testified that he agreed to discount it $1000 for cash. I disbursed during the period involved a total of over $4000 for Knutsen. The uncontradicted testimony is that I intended to use the Heddon money to close the deal with Crawford but that since the Crawford deal did not materialize and Heddon demanded his money back plus the $100 bonus interest after the 60 day extension I gave him his money back. If I was going to help Knutsen I had no choice then but to use my own money. This I did. The contract I had with him was long term, low interest and a cash discount of approximately 25% was not unreasonable between any two persons. Appellees do not contend that it was unreasonable. The money I advanced above $2881.00 was money of my own for which I was to be reimbursed when Knutsen was fortunate enough to make a good deal. The contract was the same one that I entered into without having seen the property

but which Knutsen got me to buy by paying my employee a $500 cash "finders fee." My business dealing with Knutsen was fair, his with me was not.

My motion for new trial

My brief, 17, Assignment of Error 8; appellees' brief 61.

In connection with the motion for a new trial I asked for time within which to amplify it. I filed it within the time provided by the rule becau I saw from the attitude of the court toward me that if I merely asked for time and didn't file the motion he would deny me the right to file any at all. I order a transcript and hoped that if I had it before me and could document my points, hoping against hope, prejudiced though he was, the court might see the light. The court controlls the court's own reporter's order of preference. In this instance the court made sure that I would not have a transcript available for amplification of my motic or for use in arguing the motion. It denied my motion for extension of time and set the hearing on the motion for new trial before the reporter completed the transcript. I do not know that this would have any legal effect but it should shed some light on the prejudice aspect of the case.

Knutsen's credibility gap

My assignment of error 9, op br 18, appellees' brief 63.

A good deal of this case can be determined from facts and circumsta outside of the evidence adduced in person by each of the parties. Allowa should always be made for the emotional effect of the interest of parties affects their memory, especially on matters long gone by. That is one the basic reasons for the operation of the Statute of Limitations. After making allowance for interest and memory, Knutsen must for factual ba pit his testimony against mine to prove fraud. In the Harry Bridges cas the courts' reversals on appeal were based primarily on the unreliabilit

the witnesses against him. Appellees did not point out in one instance wherein my testimony was impeached or was inconsistent with obvious facts. In this brief and in my opening brief I have shown intentional misstatements by Knutsen in some instances and such other inconsistencies as to make his testimony unuseable for effectively demeaning me. I believe my assignment of error 9 was well based and that the only reason appellees did not answer it directly is that Knutsen's credibility and his testimony against me cannot stand scrutiny and close observation.

What sense, for instance, is there in his testimony that I advised placing his property in the name of a fictitious person? How does one get property back from a fictitious person? By forging non-existing persons' names and getting them falsely acknowledged? Was the reward in sight so great that a lawyer who is all evil but 50% competent would stoop that foolish as well as low?

Bear in mind that I wrote to FHA, Ex 162, "Magner Knutsen wishes to retain the property." This was after they had written, Ex 160, "I believe Crawfords are still interest in purchasing the property and have indicated to us that they might be willing to give $1000 for Knutsen's equity...I believe that this would probably be the best way out for Mr. Knutsen."

I wrote to Albert Brown, Ex 138, "I am writing you again regarding the rent that you owe for the house that belongs to Magner Knutsen." I wrote to James Seller, Ex 184, "I am satisfied that he (Knutsen) has not rented the house out yet." See also letter to U. S. attorney, Ex 115.

In looking at the deed to the Heddons, Ex 102, it will be noted that the deed was subject to the Crawford contract of sale, which shows that it was in contemplation of closing that sale.

There is not one iota of believable testimony of fraud on my part and the law is stated in :

De Yulia et ux v. Brownell, 107 Or 651, 657 (1923)
215 Pac. 576.

page 657:

"It is elementary law that fraud is never presumed and that it must be alleged and that the particular fraud must be prove by clear, satisfactory and convincing testimony."

Whether or not I was right, I believe I had a sound basis for a claim under: 83 CJS 575, Subrogation, at 624

"One who, acting in a representative or fiduciary capacity, incurs a satisfies obligations to the benefit of his principal, is subrogated to the rights of the principal against others primarily liable, and to the rights of the creditor against the principal.

579:

"Subrogation is founded on principles of justice and equity."

CONCLUSION

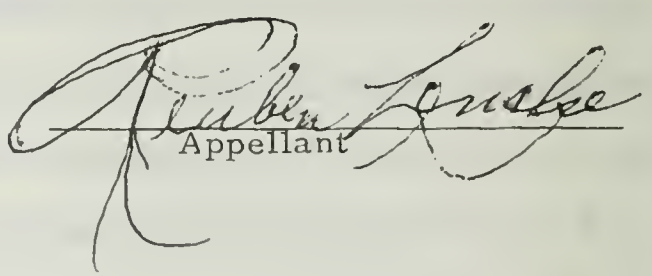
I have written too much and yet I have not written enough.

It was only a piece of string (Henri de Maupassant).

It is hard to believe that any judge would believe it is anything else.

It is harder to believe that three judges could follow suit although it is much easier to perpetuate an error in the law than to correct it.

Respectfully submitted



Appellant